IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Number 83, Original

STATE OF MARYLAND,
STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN,

Plaintiffs

VERSUS

STATE OF LOUISIANA,

Defendant

OPPOSITION TO MOTION FOR LEAVE TO INTERVENE WITH ACCOMPANYING BRIEF

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September 24th, 1979

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All parties required to be served have been served.

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OPPOSITION TO MOTION FOR LEAVE TO INTERVENE

NOW COMES the State of Louisiana, Defendant in the above entitled matter, and in response to the Motion of Columbia Gas Transmission Corporation, Consolidated Gas Supply Corporation, El Paso Natural Gas Company, Florida Gas Transmission Company, Michigan Wisconsin Pipe Line Company, Mississippi River Transmission Corporation, Natural Gas Pipeline Company of America, Northern Natural Gas Company, Panhandle Eastern Pipe Line Company, Sea Robin Pipeline

Company, Southern Natural Gas Company, Tennessee Gas Pipeline Company (a Division of Tenneco Inc.), Texas Eastern Transmission Corporation, Transcontinental Gas Pipe Line Corporation, Trunkline Gas Company, and United Gas Pipe Line Company, for leave to intervene as Plaintiffs, while expressly reserving the right to file a response to the Complaint of Intervenors should the intervention be allowed, respectfully shows:

1.

Movants may not intervene of right for the reasons that:

(1) They are without a statutory right to intervene; and

(2) Movants' interest is adequately represented by existing parties.

2.

Movants should not be permitted to intervene for the reasons that:

(1) There is no independent basis of jurisdiction with regard to Movants' claim; and

(2) The interest of Movants is being actively asserted by them in the Louisiana State Courts, the jurisdiction of which is adequate and appropriate to adjudicate the claim of the Movants.

3.

The intervention would permit a suit against the State of Louisiana by citizens of other states in contravention of the Eleventh Amendment.

The Motion for Leave to Intervene should be denied.

All of the above and foregoing is thus respectfully submitted.

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BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO INTERVENE

Although the views of MOVANTS COLUMBIA GAS TRANSMISSION CORPORATION, a Delaware corporation, CONSOLIDATED GAS SUPPLY CORPORATION, a West Virginia corporation, EL PASO NATURAL GAS COMPANY, a Delaware corporation, FLORIDA GAS TRANSMISSION COMPANY, a Delaware corporation, MICHIGAN WISCONSIN PIPE LINE COMPANY, a Delaware corporation, MISSISSIPPI RIVER TRANSMISSION CORPORATION, a Delaware corporation, NATURAL GAS PIPELINE COMPANY OF AMERICA, a Delaware corporation, NORTHERN NATURAL

GAS COMPANY, a Delaware corporation, PANHANDLE EASTERN PIPE LINE COMPANY, a Delaware corporation, SEA ROBIN PIPELINE COMPANY, an unincorporated joint venture between United Offshore Company [a Delaware corporation] and Southern Deepwater Pipeline Company [a Delaware corporation], SOUTHERN NATURAL GAS COMPANY, a Delaware corporation, TENNESSEE GAS PIPELINE COMPANY, a Division of Tenneco, Inc., a Delaware corporation, TEXAS EASTERN TRANSMISSION CORPORATION, a Delaware corporation, TEXAS GAS TRANSMISSION CORPORATION, a Delaware corporation, TRANSCONTINENTAL GAS PIPE LINE CORPORATION, a Delaware corporation, TRUNKLINE GAS COMPANY, a Delaware corporation, and UNITED GAS PIPE LINE COMPANY, a Delaware corporation, have heretofore been expressed in an *amici curiae* brief as filed on the 18th day of May, 1979,[1] they now seek to intervene.

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1. Other private companies have also expressed their views in *amici curia* briefs. *Amicus curiae* brief of American Gas Association filed May 16, 1979; *amicus curiae* brief of the State of Alabama filed May 25, 1979; *amicus curiae* brief of Associated Gas Distributors - Baltimore Gas and Electric Company, Bay State Gas Company, The Berkshire Gas Company, Boston Gas Company, Bristol & Warren Gas Company, The Brooklyn Union Gas Company, Cape Cod Gas Company, Central Hudson Gas & Electric Corporation, Chesapeake Utilities Corporation, City of Holyoke, Massachusetts, Gas & Electric Department, City of Westfield Gas & Electric Light Department, Commonwealth Gas Company, Concord Natural Gas Corporation, The Connecticut Gas Company, Consolidated Edison Company of New York, Inc., Delmarva Power & Light Company, Elizabethtown Gas Company, Fall River Gas Company, Fitchburg Gas & Electric Light Company, Haverhill Gas Company, Long Island Lighting Company, Lowell Gas Company, Lynchburg Gas Company, Manchester Gas Company, New Bedford Gas & Edison Light Company, New Jersey Natural Gas Company, New York State Electric & Gas Corporation, Northern Utilities, Inc., The Pequot Gas Company, Philadelphia Electric Company, Philadelphia Gas Works, Providence Gas Company, Public Service Company of North Carolina, Inc., Public Service Electric & Gas Company, Rochester Gas & Electric Corporation, South County Gas Company, South Jersey Gas Company, The Southern Connecticut Gas Company, Tiverton Gas Company, UGI Corporation, Valley Gas Company and Washington Gas Light Company filed May 25, 1979. Additionally an *amici curiae* brief was filed on behalf of the United States and the Federal Energy Regulatory Commission on June 12, 1979.

No attempt has been made to label the requested intervention as one of right or permissive. It is neither for they are without a statutory right of intervention; they have failed to assert inadequate representation;[2] they are not a state and therefore have no independent basis to invoke this Court's original jurisdiction;[3] and Movants are already actively pursuing their asserted claims in other fora which are adequate and appropriate.[4]

Movants, by their proposed Complaint, seek to sue Louisiana without having obtained Louisiana's consent, either express or implied. Such an action is barred by the Eleventh Amendment.

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2. This is understandably so in that the Complainants are presently represented by the combined efforts of eight Attorneys' General.

3. "* * * But as this court is one of limited and special original jurisdiction, its action must be confined to the particular cases, controversies, and parties over which the Constitution and laws have authorized it to act, any proceeding without the limits prescribed is *coram non judice*, and its action a nullity. (10 Peters, 474; S. P., 4 Russ., 415). And whether the want or excess of power is objected by a party or is apparent to the court, it must surcease its action or proceed extrajudicially." *The State of Rhode Island and Providence Plantations v. The Commonwealth of Massachusetts*, 12 Peters 657 at 717 (1838).

4. On September 22, 1978, Edwin W. Edwards, Governor of the State of Louisiana; William J. Guste, Jr., Attorney General of the State of Louisiana; and Shirley McNamara, Secretary of the Department of Revenue and Taxation of the State of Louisiana, filed a petition for declaratory judgment as to the constitutionality of Louisiana's First Use Tax. All of the Movants were named as defendants. This proceeding was docketed under Number 216,867, Division F, Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana. Along wtih Movants' answer filed on the 26th day of February, 1979, a reconventional demand was filed by all of the Movants except Mississippi River Transmission Corporation. The very same allegations as those set forth in Movants' proposed Complaint herein were set forth in said reconventional demand. Movants attempted to remove this state court proceeding to the Federal Court. A motion to remand filed on behalf of the plaintiffs was granted. This decision may be found in 464 F. Supp. 654 (USDC MD LA. 1979). Thereafter, and on the 22nd day of June, 1979, the Movants brought an action against Shirley McNamara, Secretary, Louisiana Department of Revenue and Taxation, The Louisiana Department of Revenue and Taxation, and The State of Louisiana, under Docket Number 225,553, Division D, in Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana. In this proceeding, the very same allegations as those set forth in Movants' proposed Complaint herein are set forth in their petition.
[footnote continued on next page]

CONCLUSION

The motion to intervene should be denied for "***What a [party] cannot do directly in the mode pointed out by law, he shall not be permitted to do collaterally by evasion." *Voorhees et al. v. Jackson, ex. dem. The Bank of the United States,* 10 Peters 449 at 474 (1836).

All of the above and foregoing is thus respectfully submitted.

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[footnote continued from previous page]
These cases pose the question of the right of state officers to collect state taxes, as provided by state law, in state courts. The state taxing statute which is here called in question has never been interpreted by a court of Louisiana. It has long been held that the most appropriate place to initiate action to determine the constitutionality and validity of state taxes is in the state courts. See *Matthews v. Rogers,* 284 U.S. 521 (1931); *The Tax Injunction Act,* 28 U.S.C. Sec. 1341; and *Great Lakes Dredge and Dock Co. v. Huffman,* 319 U.S. 293 (1943). "When Federal questions arise in cases pending in the state courts, those courts are competent, and it is their duty, to decide them." *Arkansas v. Kansas & Texas Coal Co.,* 183 U.S. 185, at 191 (1901).

CERTIFICATE OF SERVICE

I, ROBERT G. PUGH, one of the attorneys for the State of Louisiana in the above-entitled proceeding, being a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 24th day of September, 1979, I served copies of the opposition to motion for leave to intervene with accompanying brief, by mailing three copies thereof in duly addressed envelopes, with postage prepaid, to:

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